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No. 06-219

In the

Supreme Court of the United States

CHARLES WILKIE, et al.,

Petitioners,

v.

HARVEY FRANK ROBBINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, WASHINGTON FARM BUREAU, AND WYOMING FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT HARVEY FRANK ROBBINS

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QUESTIONS PRESENTED

1. Whether the Fifth Amendment protects the right of the people to exclude government agents from their private property.

2. Whether the right to exclude government agents from private property necessarily includes a prohibition against governmental retaliation for the exercise of that right.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), the Washington Farm Bureau, and the Wyoming Farm Bureau Federation submit this brief amicus curiae in support of Respondent Harvey Frank Robbins.[1] All parties have consented to the filing of this brief, and the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF), the largest and most experienced nonprofit public interest law foundation of its kind, has been litigating in support of the fundamental right to own and make use of private property for over 30 years. PLF attorneys have appeared before this Court as counsel of record in *Rapanos v. United States*, __ U.S. __, 126 S. Ct. 2208 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by the Court in the past 25 years. PLF believes that its litigation experience will provide a valuable additional viewpoint on the issues presented in this case.

The Washington Farm Bureau is a Washington organization consisting of almost 30,000 productive and politically active families, speaking out on issues of concern to rural America. Formed in 1920, as part of the American Farm Bureau Federation, the Washington Farm Bureau is the largest trade association in the State of Washington.

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[1] Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The Wyoming Farm Bureau Federation represents agricultural producers throughout the State of Wyoming, many of whom have federal grazing permits as well as private properties which are intermingled with public lands. The issues surrounding this case have a direct bearing on its members.

The Farm Bureaus' members, primarily small property owners, are frequently subject to government regulation and are thus gravely concerned about the Petitioners' assertions that property owners may not exclude the government from private property. The Farm Bureaus believe that landowners adjacent to federal land should not be forced to allow easements across their land, and that trespass—particularly by federal agents—must be taken very seriously and vigorously opposed.

SUMMARY OF ARGUMENT

This case turns on the question of whether Petitioners, agents of the Bureau of Land Management (BLM), should have known that they violated a property owner's Fifth Amendment rights when they conducted a campaign of harassment and intimidation designed to induce him, against his will, to grant BLM an easement across his property. Petitioners argue that they should be granted immunity from Mr. Robbins' claims against them because, *inter alia*, they believe there is no constitutional right to exclude government agents from private property. *See* Brief for the Petitioners (Pet. Brf.) at 40-44. Moreover, even if such a right exists under the Fifth Amendment, Petitioners argue that there is no well-established right to be free of governmental retaliation for the exercise of that right. Pet. Brf. at 37-40.

Petitioners' arguments are based on a disturbing and mistaken understanding of the relationship between the American people, their government, and constitutional protections of private property rights. The Framers of the Constitution accorded great weight to the importance of private property as a bulwark of personal sovereignty and autonomy,

which not even the power of government could breach except in limited circumstances, such as through the exercise of eminent domain. The most essential strand in the bundle of rights that comprise property is the right to exclude, and the right to exclude the government is arguably the most essential filament of that strand.

If the government were allowed to retaliate against citizens who exercise their right to exclude government agents from their land, the right itself would be extinguished. In that sense, recognizing a non-retaliation component to the rights guaranteed by the Fifth Amendment is even more crucial than in the more familiar context of First Amendment rights. This Court has implicitly recognized this fact in its extension of the unconstitutional conditions doctrine to rights secured under both the First and Fifth Amendments.

Finally, Petitioners err when they characterize the Fifth Amendment as merely providing a remedy for governmental intrusions that rise to the equivalence of formal expropriations of property. *See* Pet. Brf. at 41-44. To the contrary, the Amendment recognizes a substantive right that inheres in the people and predates the Constitution—the right to possess and enjoy the use of one's private property without unauthorized intrusions and invasions, *especially* by the government and its agents.

ARGUMENT

I

THE FIFTH AMENDMENT RIGHT TO EXCLUDE THE GOVERNMENT FROM PRIVATE PROPERTY IS WELL ESTABLISHED

This case arose from a simple exercise by Respondent Frank Robbins of the personal liberties recognized and protected by the United States Constitution. When agents of the federal Bureau of Land Management asked him to grant the government an easement over his private land, Mr. Robbins said "no." *See Robbins v. Wilkie*, 433 F.3d 755, 760 (10th Cir. 2006).[2] Thereafter, according to Mr. Robbins' complaint, the agents initiated and conducted a campaign of harassment and intimidation designed to coerce him into conveying the easement. These retaliatory measures included trespassing on Robbins' property, refusing to maintain the access road to Robbins' ranch; threatening to cancel, and then cancelling, Robbins' existing rights-of-way, recreation use permit, and grazing rights; interfering with the conduct of Robbins' guest-ranch business; bringing unfounded criminal charges against Robbins, and threatening to "bury" him. *Id.* Instead of yielding to these coercive tactics, Mr. Robbins filed suit against the agents, stating claims under RICO and *Bivens*.

Before this Court, Petitioners argue that they should be granted immunity for their extortionate conduct because, *inter alia*, Mr. Robbins has no "clearly established" constitutional right to exclude federal agents from his property. Pet. Brf. at 43. Such a right is not clearly established, according to Petitioners, because the Constitution does not expressly "confer" the right to exclude government agents from private

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[2] All references in this brief to the opinion below will be to the version reported in the Federal Reporter at 433 F.3d 755.

land. *Id.* at 14-15, 44. This position reflects a deeply troubling misunderstanding of America's constitutional tradition and the relationship between the government and the governed in our constitutional order.

A. Private Property Rights Are Accorded Special Solicitude by the Constitution Because They Are Fundamental to the Preservation of Individual Liberties

Contrary to Petitioners' understanding, the Constitution is not a positive source of law that grants American citizens those rights and freedoms the government deigns to allow them. Rather, the document conveys specified, limited powers *from* the people *to* the federal government. *See, e.g., United States v. Lopez*, 514 U.S. 549, 556 (1995) ("Congress' authority is limited to those powers enumerated in the Constitution."). At the same time, the Constitution expressly recognizes some—though by no means all—individual rights understood to inhere in the people, which the government may not interdict. *See* U. S. Constitution, Amendment IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."). Thus, the fact that the Constitution does not expressly "confer" a particular right does not mean that such a right is not clearly established and protected. Rather, the test is whether a reasonable person should know that specific governmental conduct violates a citizen's rights. *See, e.g., Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995).

The special importance to the Founders of secure rights of private ownership and control of property cannot be overstated. "Throughout the revolutionary era, Americans emphasized the centrality of the right to property in constitutional thought. 'The right of property,' Arthur Lee of Virginia declared, 'is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.'" James W. Ely, Jr., *The*

Guardian of Every Other Right 26 (1992) (citation omitted). *See also* Bernard H. Siegan, *Property and Freedom* 14 (1997) ("the Framers supported protection of property rights as essential both to the fulfillment of the human condition and to the advancement of the society"); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 Sw. U. L. Rev. 627, 638 (1988) (explaining that, "[t]o the Framers, identifying property with freedom meant that, if you could own property, you were free").

The drafters of the Constitution were strongly influenced by the philosophy of John Locke, who demonstrated that rightful governmental authority serves to protect individual liberty largely by securing rights to private property. *See* John Locke, *Second Treatise of Government* 66 (S.W. Gough ed., Oxford 1966) (1690). Accordingly, the Federalists famously sought to ratify the new Constitution in order that the American State could provide "additional securities to republican government, to liberty, *and to property*." Alexander Hamilton, *The Federalist No. 85*, in George W. Carey & James McClellan, eds., *The Federalist* 452, 452 (2001) (emphasis added). As Madison saw it, "Government is instituted to protect property of every sort." James Madison, *Property*, quoted in *Winstar Corp. v United States*, 25 Cl. Ct. 541, 548 (1992).

The Framers spoke so adamantly to this issue because they understood that private property rights are the concrete expression of a free political order. They did not provide constitutional protections for property "for its own sake, but because it was the central invention by which a liberal regime recognized the freedom of the individual." Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 Cath. U. L. Rev. 817, 829 (1993); *see also* Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the Lake Tahoe Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2002) (the Framers recognized that "principles of good government

started with the protection of private property—that guardian of all other rights."). Only a year after the Constitution was adopted, John Adams expressed the Framers' universally shared view that "'[p]roperty must be secured or liberty cannot exist.'" *Discourses on Davila*, in 6 *The Works of John Adams* 280 (Charles Francis Adams ed., Boston, Little Brown 1851), quoted in *Cannon v. Delaware*, 807 A.2d 556, 569 (Del. 2002).

This centrality to the Framers of the importance of secure property rights explains why, as was noted earlier this month by the Maryland Court of Appeals:

> The framers of the Federal Bill of Rights did not place the property rights clause in some obscure part of these documents. It was placed in an amendment considered by many to be among the most important sections of that foundation stone of our form of democracy. It is found in the Fifth Amendment, included with the double jeopardy clause and the privilege against coerced self-incrimination in criminal cases clause. U.S. Const. amend. V. Immediately alongside those cornerstones of our democracy lies the property rights clause: "No person shall . . . be deprived of life, liberty, or property *without due process of law*; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V (emphasis added). Reverence is due the property rights clause just as is due the other great provisions of the Fifth Amendment. It is a fundamental right.

Mayor of Baltimore v. Valsamaki, ___ A.2d ___, 2007 WL 415356 (Md.), Feb. 8, 2007, slip op. at 36-37.

For well over 200 years, this Court, like the Founders, has recognized that private property is the cornerstone of a free society. More than a century after the Constitution's adoption, this Court noted without citation the common-sense proposition

that "in any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 324 (1893).

This Court has further recognized that

> the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972). And this Court has reiterated its understanding that the rights accorded to ownership of private property are "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

B. The Right to Exclude Others Is the Most Essential Stick in the Bundle of Rights That Comprises Property

The right to exclusive possession and occupation of property is fundamental to the concept of ownership itself: "[T]o the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property." Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 753

(1998). The centrality of this right has been understood since the dawn of property law:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world *in total exclusion of the right of any other individual in the universe.*

William Blackstone, 2 *Commentaries on the Laws of England* 2 (1766) (emphasis added).

This Court has consistently recognized the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan v. California Coastal Commission*, 483 U.S. at 834. Accord, *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the right to exclude is "universally held to be a fundamental element of the property right"). More recently, this Court has characterized the right to exclude as the "hallmark of a protected property interest." *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999).

Wyoming, the site of Mr. Robbins' property and the events at issue in this lawsuit, has recognized the right to exclude as a fundamental right since before it was admitted to the Union in 1890. See *Territory of Wyoming v. Conley*, 2 Wyo. 331, 1880 WL 5024, at *7 (1880). At least as early as 1896, Wyoming courts entertained actions for trespass which they defined as "wrongfully continu[ing] upon the land." *Caldwell v. Bush*, 46 P. 1092, 1092 (Wyo. 1896). More recently, the state's Supreme Court has reiterated that "[o]wnership of property . . . , includes the right to exclude others." *Maryland v. Flitner*, 28 P.3d 838, 848 (Wyo. 2001). As the Petitioners in this case must have been fully aware, a

Wyoming property owner "exercises full dominion and control over the land and possesses the right to expel trespassers." *Id.*

C. The Right to Exclude Others from Private Property Has Always Been Understood to Apply to Government Agents

Contrary to Petitioners' contention, the universally recognized right to exclude contains no exception for government agents. "[T]he right to exclude applies to *both government and private activity* on private land, whether the activity is the result of governmental attempts to secure a public interest or of theories associated with stronger rights emanating from custom and public trust." David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 41 (2000) (emphasis added). This Court has recognized that the owner of private property "has a right to exclude from it all the world, *including the Government*." *United States v. Karo*, 468 U.S. 705, 729 (1984) (Stevens, J., concurring) (emphasis added). The lower courts have similarly understood that the right to exclude others from one's property applies "*especially* [to] the Government." *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (emphasis added):

> The intruder who enters clothed in the robes of authority in broad daylight commits no less an invasion of these rights than if he sneaks in in the night wearing a burglar's mask. In some ways, entry by the authorities is more to be feared, since the citizen's right to defend against the intrusion may seem less clear. Courts should leave no doubt as to whose side the law stands upon.

Id. at 1375.

In the face of this strong and uniform authority, it is simply implausible to assert that Petitioners could not have

known that Mr. Robbins had a well-established constitutional right to exclude the government from his land.

II

THE RIGHT TO BE FREE OF GOVERNMENTAL RETALIATION FOR THE EXERCISE OF ONE'S FIFTH AMENDMENT RIGHTS IS WELL ESTABLISHED

The court of appeals correctly found that Petitioners' retaliatory campaign of harassment and intimidation, designed to coerce Mr. Robbins into yielding an easement to the government, violated Mr. Robbins' Fifth Amendment rights. 433 F.3d at 764-67. Petitioners argue that, because no previous appellate opinion has *explicitly* recognized the right to be free from retaliation for the exercise of Fifth Amendment rights, no "reasonable officer" would have understood that such a right exists. Pet Brf. at 37, 48. Thankfully, until now no court has been required to make such a finding, because the right not to be harassed and intimidated for exercising one's right to exclude the government is self-evident in the very concept of private property, on which our free society rests.

As set forth above, America's Founders afforded special constitutional protections to private property rights not for their own sake, but in recognition of the intimate relationship between property ownership and individual liberty. Secure rights of private ownership afford the individual a sphere of personal autonomy and security which not even the government may breach, save only through a lawful exercise of the power of eminent domain. This cherished measure of human dignity predates the Constitution, as was recognized in the famous aphorism of Sir William Pitt in 1763:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the

> storm may enter—the rain may enter—*but the King of England cannot enter*; all his forces dare not cross the threshold of the ruined tenement.

William Pitt, Earl of Chatham, Speech on the Excise Bill, *quoted* in *United States v. Nelson*, 459 F.2d 884, 885 (6th Cir. 1972).

As Pitt's choice of imagery suggests, this historical right of Englishmen, recognized by the American Constitution, is one that may readily be overcome by force or coercion. In contemporary parlance, the exercise of one's right to exclude the government is easily "chilled" if—as in the case at bar—citizens must fear the lash of retaliation if they dare to exercise it.

There are obvious parallels between this situation and those in which this Court has expressly recognized the inherent right of the people to be free from governmental retaliation. As Petitioners acknowledge, the implicit constitutional protection against retaliation has been noted frequently in the First Amendment context. *See* Pet. Brf. at 37-38. As this Court held in one such case,

> even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citations omitted). The infringement involved in *Perry* was the retaliatory termination of an at-will employment contract. This Court held that such a denial would violate Robert Sindermann's First Amendment rights if he could show that the action was taken in retaliation for Sindermann's prior public

criticisms of the school administration. The Court's rationale was straightforward:

> [I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

Id. (citation omitted).

Replace the words "speech or associations" in this passage with "right to exclude the government," and the Court's holding in *Sindermann* is fully applicable to the case at bar. Petitioners do not suggest that Robert Sindermann's actions were any more praiseworthy than Frank Robbins'—both men simply chose to assert against the government the rights guaranteed to all citizens by our Constitution. Nor can Petitioners plausibly maintain that Sindermann (an experienced professor with a wide selection of schools at which he could be employed) was more seriously injured by the government's retaliation than was Robbins (a small rancher whose livelihood depends on the property at issue here). Rather, Petitioners distinguish *Sindermann* and related cases solely on the basis of the specific constitutional provision under which they arose. Pet. Brf. at 37-40.

This distinction is important, Petitioners assert, because "the concerns about chilling protected activity that motivate the anti-retaliation doctrine in the First Amendment context are not present, or at least are greatly reduced, in the Fifth Amendment takings context." Pet. Brf. at 38. No authority is given for this proposition; and in fact, the opposite conclusion is at least equally compelling. If an employment contract is not renewed because of a teacher's expressive conduct, that teacher may well be more guarded in his or her future public communication—that is, the teacher's exercise of First Amendment rights may be

chilled. But if the government is allowed to pursue a course of harassment and intimidation because a citizen asserts his property rights against government agents, those rights are not simply chilled, *they are effectively destroyed.*

As has been noted above, the defining characteristic of property rights is that they provide a locus of security, privacy, and personal autonomy against even the highest authority, which cannot be breached except through specified, lawful procedures. When governmental retaliation for the assertion of those rights takes the form it did here, the right of property itself is reduced to no more than a formality of title; the essence of the right is extinguished. (In this, the right to exclude the government from private property shows a clear affinity with that other bastion of Fifth Amendment liberties, the right not to be required to give testimony against oneself. In both instances, the application of governmental coercion against those who assert the right destroys the essence of what is to be protected. *See, e.g., Diminnie v. United States*, 728 F.2d 301, 307 (6th Cir. 1984) (citizen may not be prosecuted in a civil action "for exercising his constitutional right to remain silent").) Thus, the rationale for recognizing a non-retaliation component to the guarantees of the Fifth Amendment is in this sense even stronger than that for rights secured by the First Amendment. *Cf.* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 89 (2001) (reviewing application of the unconstitutional conditions doctrine in First and Fifth Amendment contexts and noting, "the Supreme Court has come closer to grasping the essential logic of coercion in its takings decisions than anywhere else.").

Finally, although this Court has not had occasion to expressly recognize the right to non-retaliation as implicit in the Fifth Amendment, the concept is fairly included in the doctrine of unconstitutional conditions, which has been applied uniformly in both First and Fifth Amendment contexts. In

Dolan v. City of Tigard, a land-use case, this Court evaluated the constitutionality of a regulatory exaction under substantially the same test as it applied in *Sindermann*, holding that landowners may not be required to give up a constitutional right in exchange for a "benefit conferred by the government." *Dolan*, 512 U.S. at 385 (citing *Perry v. Sindermann*). Indeed, Justice Stevens in dissent drew attention to the majority's apparent equating of Fifth Amendment and First Amendment interests, for purposes of applying the unconstitutional conditions doctrine. *See id.* at 407 (Stevens, J., dissenting). *See also* Rodney A. Smolla, *Doctrine of Unconstitutional Conditions: Rough Proportionality Standard of Dolan v. City of Tigard*, 1 Smolla & Nimmer on Freedom of Speech § 7:14 (database updated October, 2006) (speculating on the extent to which *Dolan* "can be exploited in civil rights and civil liberties cases, striking down conditions imposed by the government that limit the exercise of non-property rights, such as the free exercise of religion or freedom of expression").

Petitioners argue that the *Dolan* doctrine has no application here, in part because the government's coercive tactics failed to effect "an actual interference with property owned by the private citizen." Pet. Brf. at 47. This argument, however, rests on an indefensibly narrow and formalistic understanding both of property rights, and of the "benefits" Petitioners' actions were designed to withhold from Mr. Robbins.

Mancur Olson demonstrated that secure property rights become of fundamental importance as soon as society progresses beyond the structural dominance of roving bandit gangs and adopts rudimentary governmental institutions. *See* Mancur Olson, *Power and Prosperity* 34-43 (2000). This proposition was not in doubt among the English jurists who laid the groundwork for our Constitutional protections. *See, e.g.*, *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765) ("The great end, *for which men entered into society*, was to

secure their property.") (emphasis added). But this security is the very "governmental benefit" Petitioners sought to withhold from Mr. Robbins unless he forfeited his right to exclude federal agents from his land! Citizens who are subjected to a continuing vendetta of harassment, intimidation, and threats by official agents are being denied the fundamental benefits of organized society, which governments are instituted to provide. Under this Court's *Dolan* analysis, Petitioners' retaliatory efforts to extort an easement from Mr. Robbins clearly fits within the unconstitutional conditions doctrine, thereby violating Mr. Robbins' well-established rights.

III

PETITIONERS ARE WRONG THAT THE FIFTH AMENDMENT MERELY PROVIDES A REMEDY

Petitioners read the Fifth Amendment's Takings Clause not as guaranteeing the security of private property against unauthorized governmental intrusion, but merely as providing a "money remedy" when those intrusions rise to such a level as to become tantamount to outright expropriation. *See* Pet. Brf. at 28-30, 41-44. But such a reading confuses the right with the remedy. The Fifth Amendment affirms the traditional right of free citizens—embodied in Pitt's famous aphorism, quoted above—to be secure in the exclusive possession of their homes and land against unauthorized entry by government agents. It is true that the Takings Clause *goes beyond* the rights recognized at common law, by setting forth a condition upon which the government may override the right of exclusive possession—i.e., by purchasing the property outright. Payment of just compensation, in other words, allows the government to "trump" the citizen's right to exclusive possession. But no plausible reading of the clause could grant government agents the "right" to enter and re-enter private property at will, over the clearly expressed prohibition of the owner, so long as a court

does not hold them liable for compensation at inverse condemnation.

The source of individual rights against the government is not the government, as Petitioners argue. Pet. Brf. at 41. The Fifth Amendment "confers" no rights, but merely recognizes and enunciates the fundamental, historic right of all free people not to have their property invaded by the government or its agents except upon payment of just compensation under the power of eminent domain. Petitioners have never alleged, and do not allege now, that just compensation has ever been offered to Mr. Robbins. Therefore, Petitioners' conduct in this case violates the Fifth Amendment on its face, by its plain terms.

CONCLUSION

For the foregoing reasons, the opinion of the Court of Appeals should be AFFIRMED and the case remanded to the district court for trial.

Respectfully submitted,

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